

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO
3

4 EDGARDO L. BIBILONI DEL VALLE,
5 Plaintiff,
6 v.
7 THE COMMONWEALTH OF PUERTO
8 RICO, et al.,
9 Defendants.

CIVIL NO. 07-1362 (RLA)

10

11 **ORDER IN THE MATTER OF MOTION TO DISMISS**
12 **FILED BY THE INDIVIDUAL DEFENDANTS**

13 ANGEL RIVERA GONZALEZ, GALO SEGARRA and MARIA DIAZ BAEZ, the
14 individually-named defendants in these proceedings, have moved the
15 Court to dismiss the claims asserted against them in these
16 proceedings pursuant to the provisions of Rule 12(b) (6) Fed. R.
17 Civ. P.

18 The Court having reviewed the memoranda filed by the parties as
19 well as the pleadings on file hereby rules as follows.

20

21 **BACKGROUND**

22 This action was instituted by EDGARDO BIBILONI DEL VALLE against
23 the COMMONWEALTH OF PUERTO RICO ("COMMONWEALTH"), the P.R. POLICE
24 DEPARTMENT ("PR-PD") as well as the aforementioned individually-named
25 defendants¹ alleging sexual harassment and retaliation under both

26 ¹ The claims asserted against PEDRO TOLEDO DAVILA, RAMON A.
ORTEGA RODRIGUEZ, VILMA FERNANDEZ BERMUDEZ, FRANCISCO QUIÑONES RIVERA
and CARMEN T. LUGO SEMOLINO, the other individual defendants, were

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3 federal and state legal provisions. Plaintiff asserts federal causes
4 of action pursuant to Title VII of the Civil Rights Act of 1964, as
5 amended, 42 U.S.C. §§ 2000e, 2000e-3(a) (Title VII) as well as under
6 42 U.S.C. §§ 1983 and 1988 for breach of the due process and equal
7 protection clauses of the United States Constitution.

8 Additionally, plaintiff claims violation of the Puerto Rico
9 anti-discrimination statutes, Act No. 17 of April 22, 1988, P.R. Laws
10 Ann. tit. 29 § 155 (2002) and 69 of July 6, 1985, as amended, P.R.
11 Laws Ann. tit. 29, § 1321-1341 (2002) as well as the local tort
12 provisions, arts. 1802 and 1803 of the Puerto Rico Civil Code, P.R.
13 Laws Ann. tit. 31 §§ 5141 and 5142 (1990) under our supplemental
14 jurisdiction.

15 The request for dismissal raises the defense of qualified
16 immunity; lack of supervisory liability; failure to state a claim
17 under the Fifth Amendment; lack of individual liability under Title
18 VII; failure to state a § 1983 cause of action as to codefendant
19 ANGEL RIVERA GONZALEZ, and time bar. Additionally, movants petition
20 that the supplemental claims be likewise dismissed.

21 **FACTUAL BACKGROUND**

22 According to the complaint, while employed as a janitor with the
23 PR-PD plaintiff was the object of inappropriate touching and sexual
24 harassment by a fellow janitor. This unwelcomed conduct was so severe

25 _____
26 voluntarily dismissed by plaintiff. See Partial Judgment filed on
November 13, 2007 (docket No. 12).

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2 and pervasive as to constitute a hostile work environment. Plaintiff
3 further alleges that the harassment was known to his supervisors who
4 failed to take any corrective action.
5

6 Plaintiff further alleges that he was terminated in retaliation
7 for having complained of the sexually charged environment.
8

RULE 12(b) (6) STANDARD

9 In disposing of motions to dismiss pursuant to Rule 12(b) (6)
10 Fed. R. Civ. P. the court will accept all factual allegations as true
11 and will make all reasonable inferences in plaintiff's favor.
12 Frazier v. Fairhaven School Com., 276 F.3d 52, 56 (1st Cir. 2002);
13 Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co., 267
14 F.3d 30, 33 (1st Cir. 2001); Berezin v. Regency Sav. Bank, 234 F.3d
15 68, 70 (1st Cir. 2000); Tompkins v. United Healthcare of New England,
16 Inc., 203 F.3d 90, 92 (1st Cir. 2000).

17 Our scope of review under this provision is a narrow one.
18 Dismissal will only be granted if after having taken all well-pleaded
19 allegations in the complaint as true, the court finds that plaintiff
20 is not entitled to relief under any theory. Brown v. Hot, Sexy and
21 Safer Prods., Inc., 68 F.3d 525, 530 (1st Cir. 1995) cert. denied 116
22 S.Ct. 1044 (1996); Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st
23 Cir. 1994). Further, our role is to examine the complaint to
24 determine whether plaintiff has adduced sufficient facts to state a
25 cognizable cause of action. Alternative Energy, 267 F.3d at 36. The
26 complaint will be dismissed if the court finds that under the facts

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3 as pleaded plaintiff may not prevail on any possible theory.
4 Berezin, 234 F.3d at 70; Tompkins, 203 F.3d at 93.

5 **QUALIFIED IMMUNITY**

6 Qualified immunity shields officials from having to pay for
7 damages resulting from violations of § 1983 provided certain
8 particular circumstances are present. "The doctrine of qualified
9 immunity 'provides a safe harbor for a wide range of mistaken
10 judgments.'" Kauch v. Dep't for Children, Youth and Their Families,
11 321 F.3d 1, 4 (1st Cir. 2005) (citing Hatch v. Dep't for Children,
12 Youth and Their Families, 274 F.3d 12, 19 (1st Cir. 2001)).

13 The court will follow a three-part inquiry in ascertaining
14 whether or not a defendant is entitled to protection. Initially, the
15 court will consider "whether the plaintiff's allegations, if true,
16 establish a constitutional violation." Whalen v. Mass. Trial Court,
17 397 F.3d 19, 23 (1st Cir. 2005). If so, the court will proceed to
18 determine "whether the right was clearly established at the time of
19 the alleged violation." *Id.* "Finally, we ask whether a similarly
20 situated reasonable official would have understood that the
21 challenged action violated that right." *Id.*

22 Thus, "qualified immunity remains available to defendants who
23 demonstrate that they acted objectively reasonably in applying
24 clearly established law to the specific facts they faced." Burke v.
25 Town of Walpole, 405 F.3d 66, 86 (1st Cir. 2005). In other words,
26 whether "an objectively reasonable official in the defendants'

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2 position would not necessarily have understood that his action
 3 violated plaintiff's rights". Whalen, 397 F.3d at 28.
 4

5 Because qualified immunity is an affirmative defense it is
 6 defendant's burden to present evidence of its applicability. Dimarco-
Zappa v. Cabanillas, 238 F.3d 25, 35 (1st Cir. 2001).
 7

8 In support of their qualified immunity defense petitioners argue
 9 that they "**never** violated Plaintiff's Constitutional rights"² in that
 10 they timely and adequately investigated plaintiff's complaints.
 11 However, taking the well-pleaded allegations of the complaint as true
 12 as mandated by the motion to dismiss standard, this argument must be
 13 rejected. As part of the allegations contained in the pleading filed
 14 with the court, plaintiff specifically attacked the legitimacy of the
 15 aforementioned investigation and even charged MR. SEGARRA with having
 16 manipulated the evidence taken into consideration in the
 17 investigative process.³

18 Accordingly, we reject the qualified immunity defense raised in
 19 the motion currently before us.

20 SUPERVISORY LIABILITY

21 The doctrine of *respondeat superior*, whereby liability is
 22 imposed on employers for the acts or omissions of their employees is

23 ² Motion to Dismiss (docket 35) p. 5 (emphasis in original).
 24

25 ³ In pertinent part, the Amended Complaint (docket No. 13) at
 26 ¶ 17 reads: "Mr Segarra contributed in (sic) the adulteration (sic)
 of the investigation... by giving false declarations and meeting with
 his personnel so that they would lie in their declarations."

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3 inapposite in actions brought under § 1983. “[O]nly those individuals
4 who participated in the conduct that deprived the plaintiff of his
5 rights can be held liable.” Velez-Rivera v. Agosto-Alicea, 437 F.3d
6 145, 156 (1st Cir. 2006) (citation and internal quotation marks
7 omitted). Supervisors will be held accountable under this provision
8 solely “on the basis of [their] own acts or omissions”. Barreto-
9 Rivera v. Medina-Vargas, 168 F.3d 42, 48 (1st Cir. 1999); Diaz v.
10 Martinez, 112 F.3d 1, 4 (1st Cir. 1997); Maldonado-Denis v. Castillo-
11 Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994); Gutierrez-Rodriguez v.
12 Cartagena, 882 F.2d 553, 562 (1st Cir. 1989). “In § 1983 cases,
13 supervisors are not automatically liable for the misconduct of those
14 under their command. A [p]laintiff must show an affirmative link
15 between the subordinate officer and the supervisor, whether through
16 direct participation or through conduct that amounts to condonation
17 or tacit authorization.” Velez-Rivera, 437 F.3d at 156 (citation and
18 internal quotation marks omitted). “Such liability can arise out of
19 participation in a custom that leads to a violation of constitutional
20 rights, or by acting with deliberate indifference to the
21 constitutional rights of others.” Diaz v. Martinez, 112 F.3d at 4
22 (citations omitted).

23 Defendants argue that the complaint is devoid of any allegations
24 indicating that either GALO SEGARRA and/or MARIA DIAZ BAEZ, as
25 supervisors, were personally involved in the actions charged in this

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3 suit. Our reading of the complaint shows a completely different
4 scenario.

5 Plaintiff specifically alleged that GALO SEGARRA, his immediate
6 supervisor, promoted the sexual harassment at issue and even
7 instigated the harasser to engage in the sexually charged conduct.
8 Additionally, plaintiff averred that the harassment was known to both
9 MR. SEGARRA and MARIA DIAZ BAEZ, SEGARRA's supervisor, and that they
10 failed to take any corrective measures. Further, MR. SEGARRA is
11 accused with having tainted an investigation regarding the
12 aforementioned conduct initiated in response to plaintiff's
13 grievance.

14 Based on the foregoing, it is evident that the claims asserted
15 against the supervisors in this suit are based specifically on their
16 own acts or omissions. Hence, this argument is without merit.

17 **FIFTH AMENDMENT**

18 It appearing that "[t]he Fifth Amendment [to the U.S.
19 Constitution] applies only to violations of constitutional rights by
20 the United States or a federal actor", Jones v. City of Jackson, 203
21 F.3d 875, 880 (5th Cir. 2000), the claims asserted under this
22 provision in this case must be **DISMISSED** pursuant to defendants'
23 request. Rather, the due process violations charged herein must be
24 examined under the confines of the Fourteenth Amendment. See, Daniels
25 v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

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3 **TITLE VII - INDIVIDUAL LIABILITY**

4 Art. 703 of Title VII of the 1964 Civil Rights Act, as amended,
5 makes it unlawful for an employer "to fail or refuse to hire... or
6 otherwise to discriminate against any individual with respect to his
7 compensation, terms, conditions, or privileges of employment because
8 of such individual's race, color, religion, sex, or national origin".
9 42 U.S.C. § 2000e-2(a)(1) (emphasis ours). The statute also prohibits
10 retaliation for having participated in any proceeding related to
11 Title VII or opposed any unlawful practice under Title VII, 42 U.S.C.
12 § 2000e-3(a).

13 It has been held that the individually named defendants cannot
14 be held liable since the scope of the statute is limited to employers
15 of the alleged victim of discrimination. See, Thanongsinh v. Bd. of
Educ. 462 F.3d 762, 772 (7th Cir. 2006); Lissau v. S. Food Serv.,
Inc., 159 F.3d 177, 181 (4th Cir. 1998); Gastineau v. Fleet Mortg.
Corp., 137 F.3d 490, 493 (7th Cir. 1998); Olivo-González v. Teacher's
Ret. Bd., 208 F.Supp.2d 163, 166 (D.P.R. 2002); Matos v. Ortiz v.
Com. of Puerto Rico, 103 F.Supp.2d 59, 61 (D.P.R. 2000); Maldonado-
Cordero v. AT&T, 73 F.Supp.2d 177, 184 (D.P.R. 1999); Canabal v.
Aramark Corp., 48 F.Supp.2d 94, 96 (D.P.R. 1999); Santiago v. Floyd,
33 F.Supp.2d 99, 102 (D.P.R. 1998).

23 Based on the foregoing, the Title VII claims asserted against
24 the named defendants in their personal capacity are hereby **DISMISSED**.
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3 **ANGEL RIVERA GONZALEZ - FAILURE TO STATE A § 1983 CLAIM**4
5 In order to prevail in a § 1983 claim plaintiff must bring forth
6 evidence: (1) that defendant acted "under color of state law" and (2)
7 deprivation of a federally protected right. Velez-Rivera, 437 F.3d at
8 151-52; Rogan v. City of Boston, 267 F.3d 24 (1st Cir. 2001); Dimarco-
9 Zappa, 238 F.3d at 33; Collins v. Nuzzo, 244 F.3d 246 (1st Cir. 2001);
10 Cruz-Erazo, 212 F.3d 617, 621 (1st Cir. 2000); Barreto-Rivera, 168
F.3d at 45.11
12 "In general, section 1983 is not implicated unless a state
13 actor's conduct occurs in the course of performing an actual or
14 apparent duty of his office, or unless the conduct is such that the
15 actor could not have behaved in that way but for the authority of his
16 office." Martinez v. Colon, 54 F.3d 980, 986 (1st Cir. 1995). "[A]
17 person acts under color of state law when he abuses the position
18 given to him by the State." *Id.* (internal citation and quotation
19 marks omitted). "Even though 'acting under color of law' includes
20 'acting under pretense of law' for purposes of a state action
21 analysis, there can be no pretense if the challenged conduct is not
22 related in some meaningful way either to the officer's governmental
23 status or to the performance of his duties." *Id.* at 987.24
25 Defendants argue that there is no indication in the complaint
26 that ANGEL RIVERA GONZALEZ was acting under color of state law when
the harassing conduct took place because MR. RIVERA GONZALEZ was
merely a fellow janitor at the PR-PD at the time. However, regardless

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3 of his position vis à vis plaintiff at work, the fact is that, *inter*
 4 *alios*, codefendant "physically harassed the plaintiff by touching him
 5 in his intimate parts"⁴ during work hours while they were both
 6 employed at the PR-PD. We find this sufficient to find the necessary
 7 state action requirement.

8 Accordingly, the request to dismiss § 1983 claim asserted
 9 against ANGEL RIVERA GONZALEZ personally is hereby **DENIED**.

10 **TIMELINESS - § 1983**

11 State law determines the limitations period applicable to
 12 actions filed under § 1983. Vistamar, Inc. v. Fagundo-Fagundo, 430
 13 F.3d 66, 70 (1st Cir. 2005); González-Alvarez v. Rivero-Cubano, 426
 14 F.3d 422, 425 (1st Cir. 2005); Rodríguez-García v. Municipality of
 15 Caquas, 354 F.3d 91, 96 (1st Cir. 2004).

16 In Puerto Rico, the one-year term used for actions sounding in
 17 tort as provided for in the Civil Code, P.R. Laws Ann. tit. 31,
 18 § 5298(2) (1990), has been found applicable to this provision.
Villanueva-Méndez v. Nieves-Vázquez, 440 F.3d 11, 15 (1st Cir. 2006);
González-Alvarez, 426 F.3d at 425; Rodríguez-García, 354 F.3d at 96;
Ruiz-Sulsona v. Univ. of Puerto Rico, 334 F.3d 157, 159 (1st Cir.
 2003). "One year means 365 days, or 366 days in a leap year."
Carreras-Rosa v. Alves-Cruz, 127 F.3d 172, 173 (1st Cir. 1997).

23 "[T]he length of the limitations period, and closely related
 24 questions of tolling and application are to be governed by state
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26 ⁴ Amended Complaint (docket No. 13) ¶ 16.

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3 law." Wilson v. Garcia, 471 U.S. 261, 269, 105 S.Ct. 1938, 85 L.Ed.2d
 4 254 (1985); Poy v. Boutselis, 352 F.3d 479, 483 (1st Cir. 2003);
 Carreras-Rosa, 127 F.3d at 173.

5 Even though we apply the Puerto Rico limitations provision,
 6 federal law determines the accrual date of a § 1983 cause of action.⁵
 7 Nieves-Vega v. Ortiz-Quiñones, 443 F.3d 134, 136 (1st Cir. 2006);
 8 Rodríguez-Garcia, 354 F.3d at 96.

9 "[T]he time of accrual of a civil rights action is when the
 10 aggrieved party knows or has reason to know of the injury which is
 11 the basis for his action or when the facts supportive of a civil
 12 rights action are or should be apparent to a reasonably prudent
 13 person similarly situated." Rodríguez Narvaez v. Nazario, 895 F.2d
 14 38, 42 n.5 (1st Cir. 1990). See also, Nieves-Vega 443 F.3d at 136;
 15 Villanueva-Méndez, 440 F.3d at 15; Vistamar, Inc., 430 F.3d at 70;
 16 González-Alvarez, 426 F.3d at 425; Rodríguez-Garcia, 354 F.3d at 97;
 17 Ruiz-Sulsona, 334 F.3d at 159. "The accrual period for a § 1983
 18 action 'ordinarily starts when the plaintiff knows, or has reason to
 19 know, of the injury on which the action is based.'" Carreras-Rosa,
 20 127 F.3d at 173 (citing Rivera-Muriente v. Agosto-Alicea, 959 F.2d
 21

22 ⁵ Regardless on when the action accrues, Puerto Rico law will
 23 determine when the statute of limitations will begin to run. "[W]hen
 24 the federal court borrows the state statute of limitations, so too
 25 the date on which the limitations period starts to run should be
 26 determined by the state law defining the 'application' of the
 limitations period." Carreras-Rosa, 127 F.3d at 174. In Puerto Rico,
 the limitations period begins "on the day following the date of
 accrual." *Id.* at 175.

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3 349, 353 (1st cir. 1992)). "In determining the commencement of
4 accrual, '[t]he first step... is to identify the actual injury of
5 which the plaintiff complains.'" Vistamar, Inc., 430 F.3d at 70
6 (*citing Guzmán-Rivera v. Rivera-Cruz*, 29 F.3d 3, 5 (1st Cir. 1994)).

7 Defendants allege that the sexual harassment claims are time-
8 barred because this suit was commenced on April 30, 2007, and
9 plaintiff had previously complained of this conduct close to two
10 years prior, in September 2005. However, no reference to the 2005
11 date appears in the Amended Complaint filed in this case which is the
12 pleading we are bound to examine pursuant to Rule 12(b) (6).

13 Additionally, defendants argue that they were served with copy
14 of the complaint after expiration of the limitations period which
15 also renders the suit untimely.

16 Pursuant to P.R. Laws Ann. tit. 31, § 5303 (1990) one of the
17 options available for tolling the aforementioned statute of
18 limitations is by instituting judicial proceedings. The tolling takes
19 effect by the mere filing of the complaint - without regard to
20 service of process or the fact that the court may eventually be found
21 to lack jurisdiction - and lasts until the judicial proceedings have
22 finally concluded. Martínez Arcelay v. Peñagaricano, 145 D.P.R. 93
23 (*1998*); Agosto v. Municipio de Rio Grande, 143 D.P.R. 174 (*1997*);
24 Durán-Cepeda v. Morales-Lebrón, 112 D.P.R. 623 (*1982*); Moa v.
25 Commonwealth, 100 P.R.R. 572, 589 (*1972*).

26 Accordingly, this argument is without merit.

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3 Lastly, movants contend that the original complaint, filed on
 4 April 30, 2007, did not include any claims against codefendants GALO
 5 SEGARRA or ANGEL RIVERA GONZALEZ for which reason the claims asserted
 6 against them are time-barred. However, in the initial pleading
 7 plaintiff did complain, *inter alios*, that GALO SEGARRA, as
 8 supervisor, "continued with his retaliation patterns against [him
 9 and]... promoted the sexual harassment between employees"⁶ and that
 10 ANGEL RIVERA GONZALEZ "with his homosexual conduct was the principal
 11 cause in the hostile and offensive environment in the workplace
 12 and... caused the retaliation [complained of by plaintiff]."⁷

13 Accordingly, based on the limited scope of review allowed by
 14 Rule 12(b) (6) this request is **DENIED**.

15 **SUPPLEMENTAL JURISDICTION**

16 It appearing that the federal causes of action remain
 17 outstanding, the request to dismiss the local claims asserted
 18 pursuant to our supplemental jurisdiction is hereby **DENIED**.

19 **CONCLUSION**

20 Defendants' Motion to Dismiss (docket No. 35)⁸ is hereby granted
 21 only insofar as the dismissal of the Fifth Amendment claims as well
 22 as the Title VII claims asserted against individual defendants in
 23 their personal capacity.

24 ⁶ Complaint (docket No. #4) ¶ 22.

25 ⁷ Complaint (docket No. 4) ¶ 24.

26 ⁸ See Opposition (docket No. 34).

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2 Judgment shall be entered accordingly.

3 IT IS SO ORDERED.

4 San Juan, Puerto Rico, this 14th day of August, 2008.

5
6 S/Raymond L. Acosta
7 RAYMOND L. ACOSTA
8 United States District Judge

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